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Implementing open licensing in government open data initiatives: a review of Australian government practice

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ABSTRACT

As support grows for greater access to information and data held by governments, so does awareness of the need for appropriate policy, technical and legal frameworks to achieve the desired economic and societal outcomes. Since the late 2000s numerous international organizations, inter-governmental bodies and governments have issued open government data policies, which set out key principles underpinning access to, and the release and reuse of data. These policies reiterate the value of government data and establish the default position that it should be openly accessible to the public under transparent and non-discriminatory conditions, which are conducive to innovative reuse of the data. A key principle stated in open government data policies is that legal rights in government information must be exercised in a manner that is consistent with and supports the open accessibility and reusability of the data. In particular, where government information and data is protected by copyright, access should be provided under licensing terms which clearly permit its reuse and dissemination. This principle has been further developed in the policies issued by Australian Governments into a specific requirement that Government agencies are to apply the Creative Commons Attribution licence (CC BY) as the default licensing position when releasing government information and data. A wide-ranging survey of the practices of Australian Government agencies in managing their information and data, commissioned by the Office of the Australian Information Commissioner in 2012, provides valuable insights into progress towards the achievement of open government policy objectives and the adoption of open licensing practices. The survey results indicate that Australian Government agencies are embracing open access and a proactive disclosure culture and that open licensing under Creative Commons licences is increasingly prevalent. However, the finding that '[t]he default position of open access licensing is not clearly or robustly stated, nor properly reflected in the practice of Government agencies' points to the need to further develop the policy framework and the principles governing information access and reuse, and to provide practical guidance tools on open licensing if the broadest range of government information and data is to be made available for innovative reuse.

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open access, open data, open licence, open format, open government, public sector information, information policy, Creative Commons, copyright, information management, entrepreneur, intellectual property, pro-active publishing, machine-readable, lawful re-mix, value-adding.

1. INTRODUCTION

Access to data allows individuals and organizations to develop new insights and innovations that can improve the lives of others and help to improve the flow of information within and between countries. While governments and businesses collect a wide range of data, they do not always share these data in ways that are easily discoverable, useable, or understandable by the public.¹

As support grows for greater access to information and data held by governments, so does awareness of the need for appropriate policy, technical and legal frameworks to achieve the desired economic and societal outcomes. Since the late 2000s numerous international organizations, inter-governmental bodies and governments have issued open government data policies, which

¹ G8, *Open Government Charter*, G8 Leaders' Meeting, Lough Erne, Northern Ireland (18 June 2013), paragraph 2. See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207772/Open_Data_Charter.pdf (accessed 20 June 2013).

set out key principles underpinning access to, and the release and reuse of data. These policies reiterate the value of government data and establish the default position that it should be openly accessible to the public under transparent and non-discriminatory conditions, which are conducive to innovative reuse of the data. A key principle stated in open government data policies is that legal rights in government information must be exercised in a manner that is consistent with and supports the open accessibility and reusability of the data. In particular, where government information and data is protected by copyright, access should be provided under licensing terms which do not restrict its dissemination or reuse. This principle is recognized in many policy statements, including those issued by the OECD in 2008, the Obama Administration in the United States and the G8's Open Data Charter in 2013, although as a general rule these policies do not specify that any particular licences are to be applied. By contrast, the open licensing principle has been further developed in policies adopted by Australian governments in recent years, which specify that Government agencies are to apply the Creative Commons Attribution licence (CC BY) as the default licensing position when releasing government information and data.

1.1 OECD's Public Sector Information Recommendations (2008)

The OECD's *Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information*² (OECD PSI Recommendation), which was adopted by the OECD Council on April 30, 2008, sets out 13 principles to be followed by OECD member countries in their policies on access to and use of public sector information (PSI). In the OECD PSI Recommendation, PSI is defined in broad terms, as meaning: 'information, including information products and services, generated, created, collected, processed, preserved, maintained, disseminated, or funded by or for the Government or public institution'.³

As well as establishing a presumption of openness of PSI as the default rule, the OECD PSI Recommendation encourages the adoption of appropriate licensing conditions in order to maximize the availability of PSI for use and reuse.⁴ The conditions for access to and reuse of PSI should be non-discriminatory and non-exclusive, 'without unnecessary restrictions on the ways in which it can be accessed, used, reused, combined or shared, so that in

principle all accessible information would be open to reuse by all'.⁵

Where copyright exists in PSI, the OECD PSI Principles require that it is exercised in ways that facilitate reuse, through simple and effective licensing arrangements that encourage wider access and use.⁶ The OECD PSI Principles also encourage the development of automated online licensing systems to enable reuse of PSI.⁷

1.2 G8 Open Data Charter (2013)

The Open Data Charter signed by the G8 leaders on 18 June 2013 sets out five strategic principles which will be implemented by all G8 members, as well as best practices and collective actions to give effect to the principles.⁸ Principle 1 (Open Data by Default) recognises that 'free access to, and subsequent reuse of, open data are of significant value to society and the economy' and establishes the default position that all government data will be published openly, unless there are legitimate reasons why it cannot be released. The term 'government data' is used in the widest possible sense and includes 'data owned by national, federal, local, or international government bodies, or by the wider public sector'.

Principle 5 (Releasing Data for Innovation) recognises that greater social and economic benefits will flow if government data can be used by the widest range of people and organizations, whether for commercial or non-commercial purposes. The intended operation of this principle is further clarified in the accompanying best practice guidelines which commit G8 members to supporting the release of government data by 'using open licences or other relevant instruments So that no restrictions or charges are placed on the reuse of the information for non-commercial or commercial purposes, save for exceptional circumstances.

1.3 United States Open Data Policy (2013)

The Obama Administration released the Executive Memorandum *Open Data Policy - Managing Information as an Asset* (Open Data Policy)⁹ and related authorizing Executive Order, *Making Open and Machine Readable the New Default for Government Information*¹⁰, on May 9, 2013. The Open Data Policy requires all United States Federal Government departments and agencies

² OECD, *Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information*, C(2008)36. See: <http://www.oecd.org/internet/ieconomy/40826024.pdf> (accessed 14 June 2013). At the OECD Ministerial Meeting on the Future of the Internet Economy held in Seoul, Korea in June 2008 the Ministers endorsed and adopted the Seoul Declaration on the Future of the Internet Economy, to which are annexed several OECD documents including the *Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information*. See: <http://www.oecd.org/sti/40821729.pdf> (accessed 14 June 2013).

³ OECD, *Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information*, C(2008)36. See: <http://www.oecd.org/internet/ieconomy/40826024.pdf> (accessed 14 June 2013).

⁴ Ibid. 'Openness' principle.

⁵ Ibid. 'Access and transparent conditions for reuse' principle.

⁶ Ibid. 'Copyright' principle.

⁷ Ibid. 'Access and transparent conditions for reuse' principle.

⁸ G8, *Open Government Charter*, G8 Leaders' Meeting, Lough Erne, Northern Ireland (18 June 2013). See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207772/Open_Data_Charter.pdf (accessed 20 June 2013). The five principles are: Principle 1: Open Data by Default; Principle 2: Quality and Quantity; Principle 3: Usable by All; Principle 4: Releasing Data for Improved Governance; and Principle 5: Releasing Data for Innovation.

⁹ Executive Office of the President, Office of Management and Budget (OMB), *Open Data Policy-Managing Information as an Asset* (9 May 2013). See: <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf> (accessed May 22, 2013).

¹⁰ President Obama, Executive Minute, *Making Open and Machine Readable the New Default for Government Information* (9 May 2013). See: <http://www.whitehouse.gov/the-press-office/2013/05/09/executive-order-making-open-and-machine-readable-new-default-government-> (accessed 22 May 2013).

(collectively referred to as agencies) to ‘manage information as an asset throughout its lifecycle to promote openness and interoperability, and to properly safeguard systems and information’. It regards government data and information holdings as a national asset which should be made openly available, under open licences, to facilitate lawful reuse and value-adding entrepreneurial activities, while also ensuring that citizens’ privacy, confidentiality and national security interests are safeguarded.

The Open Data Policy defines ‘open data’ as ‘publicly available data structured in a way that enables it to be fully discoverable and usable by end users.’¹¹ A characteristic of open data is that it is reusable¹² in the sense that it is ‘made available under an open license that places no restrictions on [its] use’. Part III of the Open Data Policy sets out a series of actions which US Federal Government agencies are to take in order to improve the management of their information resources and reinforce the presumption in favour of openness.¹³

Agencies are required to ‘[c]ollect or create information in a way that supports downstream information processing and dissemination activities’ and, in doing so, must ‘[e]nsure information stewardship through the use of open licenses’:

Agencies must apply open licences ... to information as it is collected or created so that if data are made public there are no restrictions on copying, publishing, distributing, transmitting, adapting, or otherwise using the information for non-commercial or for commercial purposes....¹⁴

Although the Open Data Policy does not specify the use of any particular open content licence, the range of uses that must be permitted correspond to those granted under the Creative

Commons Attribution (CC BY) licence.¹⁵ Consequently, where government information or data is subject to copyright protection, the open licensing requirement of the Open Data Policy would be satisfied by the application of a CC BY licence. Further explanation is provided in the Open Data Policy indicating that where a user of data supplements or alters original data or information that is attributed to the Federal Government, the user is required to indicate clearly the additions made and the author or source of the changes that have been made.¹⁶ Again, this requirement parallels the attribution obligations that are a standard feature of all the Creative Commons licences.¹⁷

1.4 Australian Government’s IP Principles (2010), Open Public Sector Information Principles (2011) and IP Manual (2012): setting CC BY as the default licence for PSI

To date, the Australian Government has not formally adopted a comprehensive national information policy.¹⁸ A feature of the Australian situation is that issues that might be expected to be dealt with in a fully developed information policy have instead

¹⁵ Creative Commons Attribution 3.0 Australia licence, Clause 3A, Grant of Rights. See

<http://creativecommons.org/licenses/by/3.0/au/legalcode>

¹⁶ See:

<http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf> in fn 21, p7.

¹⁷ This requirement closely coincides with the obligation on the user set out in the Creative Commons Attribution 3.0 Australia licence, Clause 4B(c):

For any Derivative Work You Distribute or publicly perform, You must take reasonable steps to clearly identify that changes were made to the Work. For example, a translation could be marked "The original work was translated from English to Spanish".

A similar provision is also contained in each of the other three Creative Commons licences which do not contain the NoDerivatives (ND) condition. Under the ND condition no changes to the original data or information are permissible.

¹⁸ The need for a comprehensive national information policy framework was first raised during the review of the National Innovation System (NIS), chaired by Dr Terry Cutler, which was established in early 2008. Information policy was a central concern of the members of the NIS review panel and was the subject of several recommendations in the Green Paper on the National Innovation System. See: Cutler and Company, *Venturous Australia: building strength in innovation*, (August 2008), recommendations 7.7 and 7.8 at p 95 and recommendation 7.14 at p 98; available at <http://www.innovation.gov.au/Innovation/Policy/Pages/ReviewoftheNationalInnovationSystem.aspx> (accessed 14 June 2013). The NIS review panel recommended the establishment of a ‘National Information Strategy to optimize the flow of information in the Australian economy’ (recommendation 7.7); that ‘to the maximum extent practicable, information, research and content funded by Australian governments – including national collections – should be made freely available over the internet as part of the global public commons’ (recommendation 7.14); and that ‘Australian governments should adopt international standards of open publishing as far as possible’ (recommendation 7.8).

¹¹ Open Data Policy, Part 1, Definitions, p 5. Part 1 also defines ‘data’ as referring to ‘all structured information, unless otherwise noted.’ By way of explanation the Policy indicates that:

‘Structured information is to be contrasted with *unstructured* information (commonly referred to as content) such as press releases and fact sheets. As described in the *Digital Government Strategy*, content may be converted to a structured format and treated as data. For example, a web-based fact sheet may be broken into the following component data pieces: the title, body text, images, and related links.’

See *Digital Government Strategy* at

<http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government.html>.

¹² The other six principles set out in the definition of “Open data” are: public, accessible, described, complete, timely and managed post-release.

¹³ Executive Office of the President, Office of Management and Budget (OMB), *Open Data Policy-Managing Information as an Asset* (9 May 2013), Part III – Policy Requirements, at pp 6-11. See: <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf> (accessed 22 May 2013).

¹⁴ Open Data Policy, Part 111, Policy Requirements, 1(c), p 7. See: <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf> (accessed 14 June 2013).

been addressed through the revision and updating of government intellectual property principles and copyright licensing policies and practices.¹⁹ In the absence of a formal information policy, the Australian Government's *Statement of Intellectual Property Principles for Australian Government Agencies*²⁰ (IP Principles) and the revised *Intellectual Property Manual*²¹ (IP Manual) have assumed a particular importance, as all Australian Government agencies are required to adhere to the standards described in these documents in performing their portfolio responsibilities.

The IP Principles (2010) and the revised IP Manual (2012) were released in response to the report of the Government 2.0 Taskforce, *Engage: Getting on With Government 2.0*, which recommended that the commercial, research and community sectors be given a greater opportunity to reuse and add value to PSI.²² As well as recommending that PSI should be 'open, accessible and reusable'²³, the Government 2.0 Taskforce recommended that PSI 'should be licensed under the Creative Commons BY standard as the default'.²⁴

¹⁹ Anne M. Fitzgerald, *State of Play: PSI Reuse in Australia* (European Public Sector Information Platform Topic Report, No. 13) (July 2010), available at http://eprints.qut.edu.au/33206/1/ePSIplatform_Topic_Report_No_13_Australia_final.pdf (accessed 20 June 2013).

²⁰ Attorney-General's Department, Australian Government, *Statement of Intellectual Property Principles for Australian Government Agencies* (1 October 2010). See: <http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/Pages/AustralianGovernmentIPrules.aspx> (accessed 22 May 2013).

²¹ Attorney-General's Department, Australian Government, *Intellectual Property Manual* (March 2012). See: <http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/Pages/AustralianGovernmentIPrules.aspx> (accessed 22 May 2013).

²² Government 2.0 Taskforce, *Engage: Getting on with Government 2.0*, Department of Finance and Deregulation (22 December 2009), recommendation 6. See: www.finance.gov.au/publications/gov20taskforcereport/index.html (accessed 14 June 2013).

²³ The Government 2.0 Taskforce recommended that, by default, PSI should be: 'free; based on open standards; easily discoverable; understandable; machine-readable; and freely reusable and transformable'. Ibid, recommendation 6.1.

²⁴ Ibid, recommendation 6.3. This recommendation echoed recommendation 7.8 in *Venturous Australia: building strength in innovation* (August 2008): 'Australian governments should adopt international standards of open publishing as far as possible. Material released for public information by Australian governments should be released under a Creative Commons licence.' Cutler and Company, *Venturous Australia: building strength in innovation* (2008). See: <http://www.innovation.gov.au/Innovation/Policy/Pages/ReviewoftheNationalInnovationSystem.aspx> (accessed 14 June 2013). On CC licensing for PSI see: Anne M. Fitzgerald, Brian F. Fitzgerald and Neale Hooper, *Enabling open access to public sector information with Creative Commons Licences: the Australian experience* in Brian Fitzgerald (ed), 'Access to Public Sector Information: Law, Technology and Policy', (Vol. 1, Sydney University Press, Sydney, 2010); available at <http://eprints.qut.edu.au/34085/> (accessed 20 June 2013).

In responding to the Government 2.0 Taskforce report, the Government accepted that PSI is a national resource that should be released on as permissive licensing terms as possible to maximise its economic and social value.²⁵ As an initial response, the *Declaration of Open Government*²⁶ was issued in July 2010, affirming the Australian Government's commitment to establishing a pro-active, pro-disclosure culture and to making government information more accessible and useable.

Subsequent steps in giving effect to the Government 2.0 Taskforce's recommendations included the release of the IP Principles, publication of the *Principles on open public sector information*²⁷ (Open PSI Principles) by the Australian Information Commissioner and revision of the IP Manual and the accompanying *Guidelines on Licensing Public Sector Information for Australian Government Agencies* (IP Guidelines).²⁸ Each of these documents adopts and reiterates the Government 2.0 Taskforce's recommendation on the use of the CC BY licence as the default licence to be used on PSI. The principle is stated in paragraph 11(b) of the IP Principles, as follows:

11(b) Consistent with the need for free and open re-use and adaptation, public sector information should be licensed by agencies under the Creative Commons BY standard as the default.²⁹

The most recent update of the IP Manual, published in March 2012, also recognizes the principle, stating:

In accordance with the Statement of IP Principles, the default position for public sector information generated by an agency should be that it is released under a

²⁵ Department of Finance and Deregulation, Australian Government, *Government Response to the Report of the Government 2.0 Taskforce* (2010), at p 3. See: <http://www.finance.gov.au/publications/govresponse20report/> (accessed 14 June 2013).

²⁶ Department of Finance and Deregulation, Australian Government, *Declaration of Open Government* (16 July 2010) <http://agimo.gov.au/2010/07/16/declaration-of-open-government/> (accessed 14 June 2013).

²⁷ Attorney-General's Department, Australian Government, *Statement of Intellectual Property Principles for Australian Government Agencies* (1 October 2010) www.ag.gov.au/RightsAndProtections/IntellectualProperty/Documents/StatementofIPprinciplesforAusGovagencies.pdf (accessed 20 June 2013).

²⁸ Attorney-General's Department, Australian Government, *Guidelines on Licensing Public Sector Information for Australian Government Agencies* (2012). See: <http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/Pages/AustralianGovernmentIPrules.aspx> (accessed 22 May 2013).

²⁹ Attorney-General's Department, Australian Government, *Statement of Intellectual Property Principles for Australian Government Agencies* (1 October 2010). See: <http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/Pages/AustralianGovernmentIPrules.aspx> (accessed 22 May 2013).

Creative Commons BY licence or other open content licence.³⁰

In 2011, the OAIC published the *Principles on open public sector information* (Open PSI principles).³¹ Principle 1 (Open access to information – a default position) recognizes that ‘[i]nformation held by Australian Government agencies is a valuable national resource’ and states that where ‘there is no legal need to protect the information it should be open to public access’. Principle 6 (Clear reuse rights) recognizes that releasing public sector information under open licensing terms enhances its economic and social value. It mirrors the recommendation in the IP Principles that the Creative Commons Attribution (CC BY) licence should be the default licensing condition when Australian Government agencies publish information online.

The approach established by the Australian Government of specifying the CC BY licence as the default licensing option when PSI is published online has been followed by various States as they established their own open data initiatives. The most recent example is the Open Data project launched by the Queensland Government in 2013 which promotes pro-active online publication of PSI under open licensing conditions so as to promote innovative reuse by the private sector.³² The CC BY Australia 3.0 licence is the licence of first choice – the default licence – for Queensland agencies to apply to their information and data to enable it to be reused for commercial and non-commercial purposes.³³ The Queensland Government’s endorsement of CC licensing is reflected in the Public Sector Intellectual Property Principles followed by Queensland Government agencies.³⁴

³⁰ Attorney-General’s Department, Australian Government, *Intellectual Property Manual* (March 2012), at p 89. See: <http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/Pages/AustralianGovernmentIPrules.aspx> (accessed 22 May 2013).

³¹ Office of the Australian Information Commissioner, Australian Government, *Principles on open public sector information* (May 2011). See: http://www.oaic.gov.au/publications/agency_resources/principles_on_psi_short.html (accessed 14 June 2013). The eight Open PSI Principles are: Principle 1: Open access to information – a default position; Principle 2: Engaging the community; Principle 3: Effective information governance; Principle 4: Robust information asset management; Principle 5: Discoverable and useable information; Principle 6: Clear reuse rights; Principle 7: Appropriate charging for access; and Principle 8: Transparent enquiry and complaint process.

³² Queensland Government, Open Data project website, at <https://data.qld.gov.au/about> (accessed 14 June 2013).

³³ The copyright notice on the Open Data project website states that ‘the CC BY 3.0 licence is to apply to all material on the website, except where otherwise expressly noted’: <https://www.qld.gov.au/legal/copyright/> (accessed 14 June 2013).

³⁴ Queensland Government, *Queensland Public Sector Intellectual Property Principles* (version 2, January 2013). See: <http://www.qld.gov.au/dsitia/assets/documents/ip-principles.pdf> (accessed 14 June 2013).

2. AUSTRALIAN INFORMATION COMMISSIONER’S SURVEY OF IMPLEMENTATION OF OPEN PSI PRINCIPLES

The Office of the Australian Information Commissioner (OAIC) has strategic functions relating to information management in the Australian Government and its agencies. Among other functions³⁵, the OAIC applies the Open PSI Principles in its role of monitoring compliance by Australian Government agencies with the publication objectives of the *Freedom of Information Act 1982 (Cth)* (FOI Act).

The results of a survey conducted on behalf of the OAIC in 2012 (the OAIC survey) provide important data on the implementation of the Open PSI Principles. The OAIC survey has particular relevance and significance as it is the first examination of the use of CC licensing by Government agencies in giving effect to open government policies. As well as contributing to understanding of current practices, the OAIC survey identifies areas in which future effort and resources might be most productively directed to ensure that the open licensing principle is applied to support open government strategies.

2.1 Background to the OAIC Survey

In April 2012, the OAIC commissioned ORIMA Research to conduct a survey of Australian Government agencies to understand, firstly, their practices in managing and publishing PSI and, secondly, their compliance with the Information Publication Scheme (IPS) established under the FOI Act.

The survey was conducted online between 30 April and 11 May 2012, with the response period extended until 17 May 2012 to allow government agencies sufficient time to obtain approval for their responses. Following completion of the survey, the OAIC entered into discussions with agencies to better understand agency responses to the survey questions and to obtain further insights into the challenges they face in implementing open government principles.

2.1.1 Survey: Part B – scope of PSI, facilitating reuse, and areas needing support

The survey sample consisted of all Australian Government agencies whose activities are subject to the FOI Act. Part B of the survey questionnaire addressed PSI, seeking to obtain information about the range of PSI held by Australian Government agencies, as well as their policies on open access to information, engaging the community, discoverability, reuse rights and the challenges they faced in publishing PSI. The Part B survey questions were structured around the Open PSI Principles issued by the Australian Information Commissioner in 2011.³⁶ The report on the survey results, *Open Public Sector Information: from principles to practice*, was published in February 2013.³⁷

³⁵ For information on the role of the Office of the Australian Information Commissioner, see: <http://www.oaic.gov.au> (accessed 14 June 2013).

³⁶ Office of the Australian Information Commissioner, Australian Government, *Principles on open public sector information* (2011). See <http://www.oaic.gov.au/information-policy/information-policy-resources/information-policy-agency-resources/principles-on-open-public-sector-information> (accessed 14 June 2013).

³⁷ Office of the Australian Information Commissioner, Australian Government, *Open Public Sector Information: from principles to*

Although completion of Part B of the questionnaire was not mandatory, of the 245 agencies that were contacted, 191 (78%) responded. The OAIC viewed this strong response rate as indicative of the commitment of Australian Government agencies to implementing 'an open access and proactive disclosure culture'.³⁸

2.2 OAIC survey questions

To ascertain the experience of Australian Government agencies in implementing the open licensing requirement of the Open PSI Principles, questions 58 to 61 of the OAIC survey related directly to Principle 6 (Clear reuse rights).

Question 58: *Does your agency have a default position of releasing public sector information under the Creative Commons BY standard?*

Question 59: *Does your agency have a default position of making public sector information available for re-use on open licensing terms?*

Question 60: *Does your agency intend to adopt a default position of releasing public sector information under the Creative Commons BY standard or other open licensing terms that facilitate re-use in the next 12 months?*

Question 61: *In the last 12 months, approximately how much of the public sector information that your agency has published been under open licensing terms (including under the Creative Commons BY standard) that facilitate reuse?*

2.2.1 Challenge of implementing open licensing

Of the 191 agencies that responded to the survey, only 8.8% indicated that Principle 6 was the most challenging to implement in practice.³⁹ In terms of the degree of difficulty experienced in implementing the eight Open PSI Principles, Principle 6 was ranked in fourth place by the survey respondents, behind Principle 5 (30.4%), Principle 1 (28.2%) and Principle 4 (16.6%).

Among the agencies that identified Principle 6 as being the most challenging to implement, 53.3% identified 'transitioning towards Creative Commons BY standard as a default position' as the most challenging aspect of implementation while 20% identified 'determining an appropriate open licence' as the most challenging issue.

2.2.2 Relevance of agency size in implementing open licensing

A significant finding from the OAIC survey was that the experience of implementing the open licensing principle differed

among different government agencies. Importantly, Australian Government agencies falling into the two largest classifications by agency size – 'very large agencies' (more than 20,000 employees) and 'large agencies' (more than 1,000 employees) – did not report challenges or difficulties in giving effect to Principle 6. However, the 'clear reuse rights' principle was a cause of concern for Australian Government agencies in the categories covering smaller to medium agencies (250-1,000 employees), small agencies (100-250 employees) and micro agencies (fewer than 100 employees).

The largest government agencies would be likely to be the custodians of significant or valuable holdings of information and data. Many of these agencies have a longstanding, strong information management culture and have considerable experience in the formulation of policies and strategies aimed at facilitating greater access to and reuse of their information and data. Even before the OAIC issued the Open PSI Principles in 2011, some Australian Government agencies had adopted CC licensing practices. For example, the Australian Bureau of Statistics, Geoscience Australia and the Bureau of Meteorology had begun removing restrictions on access to and reuse of their PSI by the mid-2000s and commenced using CC licensing in 2007-2008, with the CC BY being the default licence applied to their information and data published online.⁴⁰

2.2.3 Current or intended adoption of open licensing for PSI

Survey responses to questions on whether Australian Government agencies had already adopted open licensing for PSI or intended to do so during the next 12 months revealed a significant uptake of open licensing. Almost 60% (57.6%) of the agencies reported that they were already using the CC BY licence or another open content licence as the default or that they intended to adopt CC BY or another open content licence within the next 12 months. More than a quarter (28.3%) indicated that they were already applying the CC BY licence as the default and another 4.7% stated that they had adopted a default position of releasing PSI under other open licensing terms. The survey report does not provide any information on what open licences are being used by the 4.7% of respondents that indicated they are using an open licence other than the CC licences. Further, another 24.6% of agencies indicated that they intended to adopt the CC BY licence, or some other open licensing option, within the next 12 months.

2.2.4 Amount of PSI published under open licensing terms

Of the agencies surveyed, 48% reported that they had released at least some of their PSI under open licensing terms. Of the total, 24.6% answered that, in the last 12 months, they had published *all* or *most* of their public sector information (PSI) under open licensing terms that facilitate reuse. Of the total, 8.9% of agencies indicated that *all* of the PSI they published had been provided under open licensing terms, while 15.7% indicated that they had published *most* of their PSI under these terms. A further 23% of the agencies surveyed indicated that at least *some* of their PSI had

practice (February 2013). See <http://www.oaic.gov.au/information-policy/information-policy-resources/information-policy-reports/open-public-sector-information-from-principles-to-practice> (accessed 14 June 2013).

³⁸ Foreword, *Open Public Sector Information: from principles to practice*, (February 2013), at p 1. See: http://www.oaic.gov.au/publications/reports/open_psi_principle_to_practice_february2013.html (accessed 14 June 2013).

³⁹ Office of the Australian Information Commissioner, Australian Government, *Open Public Sector Information: from principles to practice* (February 2013), at p 5. See: http://www.oaic.gov.au/publications/reports/open_psi_principle_to_practice_february2013.html (accessed 14 June 2013).

⁴⁰ See: Australian Bureau of Statistics at <http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/%A9+Copyright?opendocument#from-banner=GB> and Geoscience Australia at <http://www.ga.gov.au/copyright.html> (accessed 14 June 2013).

been published under open licensing terms. Only 16.2% indicated that they had not used open licensing at all.

2.3 OAIC survey report recommendations

The OAIC analysed the information obtained from the survey responses and follow up consultations to formulate proposals for steps to be taken by Australian Government agencies in implementing the Open PSI Principles.

2.3.1 Active leadership for culture change and targeted training

The OAIC identified the need for 'active agency leadership' to support the significant cultural change required to give effect to the open licensing principle and the use of the CC licences as the default licensing position.⁴¹ Bringing about the necessary cultural change would require better support and training for staff to improve their understanding of the open licensing requirements set out in the IP Principles and IP Manual.

The OAIC interpreted the survey responses and the views offered by agencies in post-survey consultations as indicating either that officers in agencies lack sufficient familiarity with the IP Manual, including the degree of licensing flexibility permitted, or that the IP Manual does not provide officers with sufficiently clear, direct guidance on the outcomes desired by government.⁴²

Government agencies falling into the largest and second largest categories in terms of number of employees did not report that implementation of the 'clear reuse rights' licensing principle presented a challenge or difficulty. This finding indicates that support or assistance would most productively be focused on the numerous Australian Government agencies belonging to the three categories with the least number of employees, to assist them in dealing with the challenges they face in implementing the open licensing principle.

The fact that just over half of the 8.8% of agencies that found Principle 6 to be the most challenging to implement also identified the most challenging aspect of Principle 6 as being 'transitioning towards Creative Commons BY standard as a default position' indicates the need for further training about the CC licences and how they operate to give effect to open government information policies. Although CC BY is specified as the default licence, officers in Government agencies need to understand the features of all six licences in the CC suite if they are to make an informed decision about the most appropriate licence to apply to particular material.

2.3.2 Need for a clear statement on open licensing as the default position

The OAIC observed that the various policy documents published by the Australian Government lack a sufficiently clear and robust statement of the default licensing condition for PSI. Paragraph 11(b) in the IP Principles states in simple and direct terms that PSI

'should be licensed by agencies under the Creative Commons CC BY standard as the default'. However, the IP Manual detracts from the clarity of this statement when addressing issues of commercialisation and the use of licences other than the Creative Commons licences.⁴³ For example, the IP Manual states that 'agencies should only apply the Creative Commons "BY", or other open content licence, to particular PSI following a process of due diligence on a case by case basis'.⁴⁴ The OAIC considers that the IP Manual needs to be revised to remove ambiguities and make it clear that the default position is that government information and data will be licensed under the CC BY licence.

2.3.3 Broadening the concept of 'public sector information'

In the Australian Government's IP Principles, PSI is defined to mean material that 'agencies are generally obliged to publish or otherwise allow free public access to'.⁴⁵ The OAIC recommended that this definition should be replaced by the broader concept of PSI adopted by the OECD, namely, 'information, including information products and services, generated, collected, processed, preserved, maintained, disseminated, or funded by or for the Government or public institutions'.⁴⁶ This preference is based on the view that the broader meaning better communicates the key concept that 'all information held by government is a national resource that may be suitable for sharing with business and the wider community'.⁴⁷

3. CONCLUSIONS

The momentum towards openness for public sector data and information is strong and continues to increase. The global financial crisis has provided a renewed impetus for governments to consider how open data and access reforms might be effectively put into practice to realise the potential of taxpayer-funded information and data through enhanced levels of lawful reuse, remixing and development of new products and services.

A key principle recognized in the various open government data policies developed in recent years is that legal rights in government information must be exercised in a manner that not only supports the accessibility of the data but also enables it to be distributed and freely reused to the greatest extent possible. In particular, where government information and data is subject to copyright protection, the open government data policy objective is best achieved by providing the information or data under open licensing conditions that clearly authorize its dissemination and reuse. In Australia, the open licensing principle has been further developed into a specific requirement that the Creative Commons Attribution (CC BY) licence is to be applied as the default licence

⁴³ Ibid.

⁴⁴ Attorney-General's Department, Australian Government, *Australian Government Intellectual Property Manual* (March 2012), at p 184. See: www.ag.gov.au/RightsAndProtections/IntellectualProperty/Documents/IntellectualPropertyManual.doc (accessed 20 June 2013).

⁴⁵ Ibid.

⁴⁶ Office of the Australian information Commissioner, Australian Government, *Issues Paper 2: Understanding the value of public sector information in Australia* (November 2011), at p 9. See: http://www.oaic.gov.au/images/documents/migrated/oaic/repository/publications/papers/issues_paper2_understanding_value_public_sector_information_in_australia.pdf (accessed 20 June 2013).

⁴⁷ Ibid.

⁴¹ Office of the Australian information Commissioner, Australian Government, *Open Public Sector Information: from principles to practice* (2013), at p 36. See:

http://www.oaic.gov.au/publications/reports/open_psi_principle_to_practice_february2013.html (accessed 14 June 2013)

⁴² Office of the Australian Information Commissioner, Australian Government, *Open Public Sector Information: from principles to practice* (February 2013), at p 37. See http://www.oaic.gov.au/publications/reports/open_psi_principle_to_practice_february2013.html (accessed 14 June 2013).

when government information and data is released for access and reuse.

A wide-ranging survey of Australian Government agencies carried out in 2012, a little over a year after the Office of the Australian Information Commissioner published the Open PSI Principles, found that 48% of agencies had published information under open licensing terms, 28.3% were already applying the CC BY licence as the default licence, and 24.6% intended to adopt the CC BY licence or another open licence within the next 12 months. The high level of acceptance of open licensing generally, and of CC BY as the default licensing option, was also indicated by the fact that less than 9% of agencies considered the open licensing principle (Principle 6) to be the most difficult of the OAIC's Open PSI Principles to implement.

The survey results show that Australian Government agencies are embracing open access and a proactive disclosure culture and that open licensing is increasingly prevalent. There is strong support for the open licensing principle which has been translated into practice through the significant uptake of CC licensing. The survey findings indicate that the momentum towards open licensing is likely to be sustained into future, with almost one quarter of agencies stating that they intend to adopt the CC BY licence or another open licence within the next 12 months.

However, the survey finding that '[t]he default position of open access licensing is not clearly or robustly stated, nor properly reflected in the practice of Government agencies' points to the need for further development of the policy framework for open government data and guiding principles for information access and reuse. It also provides evidence of the need for practical guidance tools on open licensing if the broadest range of government information and data is to be made available for innovative reuse.

A feature of the Australian experience has been that open content licences (notably CC licences) have been used not only as an operational mechanism to enable PSI to be disseminated and reused, but also as a driver of information policy. By implementing open licensing of their copyright information and data, Australian Government agencies have, in effect, adopted a policy position that PSI that is made available for access will also be able to be used and reused. While the survey demonstrates an established awareness of the role of open licensing to give effect to open government information policy objectives, it also highlights the need for further work on the development of a comprehensive national information policy or strategy as was recommended in the review of the National Innovation System in 2008.⁴⁸ Open licensing strategies based on CC licences can be used to progress open government policy objectives but should operate in the context of a well developed policy framework consisting of clear statements of the policy objectives as well as principles to guide the adoption of open licensing to enable use and reuse of PSI. The importance of expediting work on the policy framework is found in the fact that 28.2% of Government agencies ranked Principle 1 (Open access to information – a default position) as being the most challenging of the OAIC's Open PSI Principles to implement, as compared to only 8.8% that

found Principle 6 (Clear reuse rights) to present the greatest challenges.

The survey also establishes the need for practical guidance and tools to be provided to assist in the implementation of the open government information policy generally and, in particular, the open licensing principle. Responses to the survey by Government agencies showed that the level of understanding, and consequent use, of open licensing is greater among the largest agencies but that smaller agencies were encountering difficulties in transitioning towards open licensing. The experience of smaller agencies indicates the need for leadership, resources and training if they are to understand the role of open licensing and be able to fully implement open government data policy objectives.

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